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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter

of

THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,

Respondents.

No. 601.

EPPLER & COMPANY,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,

Respondents.

BRIEF OF RESPONDENTS, THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

GERALD E. DWYER,
Counsel for Respondents, The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

SAMUEL H. HELLENBRAND,
LEE P. GAGLIARDI,
Of Counsel.

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Statement.

Petitioners seek writs of certiorari to review an order of the United States District Court for the Southern District of New York, entered December 28, 1948, denying petitioners' applications for allowances

for services and disbursements which they seek to charge against the Peoria and Eastern.* The order denies *in toto* the application of petitioner Aronstam for allowance of legal fees and disbursements and denies that part of the application of petitioner Eppler which seeks an allowance for preparing evidence and testifying in hearings before a Special Master.

The services for which compensation is sought by both petitioners were rendered in a railroad adjustment proceeding brought by the Peoria and Eastern under the provisions of former Chapter 15 of the Bankruptcy Act (53 Stat. 1134). By decree entered July 8, 1940 (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700), and order supplemental to decree dated April 29, 1941 (*In re Peoria and Eastern Railway Company,* 37 F. Supp. 917, cert. denied 314 U. S. 635), a three-judge Special Court granted the petition of the Peoria and Eastern for adjustment of its maturing bond indebtedness, but left open for future determination all questions concerning the amount and validity of the accounts between the Peoria and Eastern and the Operating Companies. In April, 1943, the Special Court granted the petition of the Operating Companies for the appointment of a special master to hear and report on the amount and validity of the inter-company accounts (R. 13-14).

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* The parties will be referred to herein as follows: Peoria and Eastern—The Peoria and Eastern Railway Company; New York Central—The New York Central Railroad Company; Big Four—The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Operating Companies—New York Central and Big Four.

The order appointing the Special Master, which was prepared and submitted by petitioner Aronstam, also provided:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated *as counsel to represent the Income Bondholders* of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> "Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as],* shall be approved and determined by the court" (R. 14). (Emphasis ours.)

* The language in brackets was stricken out by the Court before signing the order.

Thereafter petitioner Aronstam retained petitioner Eppler as accountants and traffic experts; petitioner Eppler investigated the intercompany accounts between the Operating Companies and the Peoria and Eastern and made a report to petitioner Aronstam; and, on the basis of said report and the testimony of petitioner Eppler in support thereof, petitioner Aronstam asserted claims in large amounts against the Operating Companies in the hearings before the Special Master.

The Peoria and Eastern was represented at the hearings before the Special Master by F. W. H.

Adams, Esq., whose appointment as counsel for the Peoria and Eastern was approved by order of the Special Court (R. 22). Mr. Adams also advanced claims against the Operating Companies, including items upon which some of the Income Bondholders' claims were based.

At the conclusion of the hearings the Special Master rendered his report recommending dismissal or disallowance of all claims with the exception of claims in the total principal amount of approximately $130,000. Upon the unanimous decision of the Special Court (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312) a decree was entered confirming the report of the Special Master with slight modifications. A petition for a writ of certiorari to review that decree was denied by this Court on February 28, 1949 (*Income Bondholders of the Peoria and Eastern Railway Company* v. *The New York Central Railroad Company, et al.,* 336 U. S. 919).

Petitioner Aronstam made application to the Special Court for fees and disbursements in the total amount of $133,390.38 (R. 33-53), and application on behalf of petitioner Eppler for an allowance for services and disbursements in the total amount of $119,451.86 (R. 23-32) to be charged against the Peoria and Eastern.

The Special Court by unanimous decision (R. 69-73) denied the application of petitioner Aronstam, and denied that part of the application of petitioner Eppler which represented services and disbursements in preparing evidence and testifying, and entered the order here sought to be reviewed (R. 73-75).

Jurisdiction of This Court.

Before discussing the merits of the pending applications for certiorari, we beg leave to refer to the statutory provision upon which the petitioners base their claim of the Court's jurisdiction (Petition, Aronstam, p. 7; Petition, Eppler, p. 7).

Chapter 15 of the Bankruptcy Act, which was approved July 28, 1939 and expired by its own terms on July 31, 1940, provided a simple and inexpensive method for railroads which were solvent, but temporarily unable to meet maturing debts, to adjust such debts. The law authorized the approval of a plan of adjustment by a three-judge Special Court and specified the parties entitled to appeal and the method by which appeal might be taken. Section 745 of the statute, upon which petitioners rely, provides:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

Petitioners argue that they are "aggrieved" by this portion of the plan but fail to consider the effect of Section 706 of the Act, the terms of which preclude these applications by petitioners. That section provides:

> "No creditor shall be deemed to be 'affected' by any plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

The order complained of neither "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners "or a modification of the security, if any", for the claim of petitioners.

Issue Before This Court.

The question of jurisdiction to one side, the only issue presented on these applications is petitioners' contentions that the decision of the Special Court is erroneous.

Petitioners' Applications for Allowances Were Properly Denied.

The Special Court found it unnecessary to decide the question whether it had jurisdiction under the statute to make the allowances requested, but it is clear from the consistent holdings in all of the cases brought under Chapter 15 of the Bankruptcy Act that the Court had no such jurisdiction. Petitioners here contend that their services "protected the interests" of the Peoria and Eastern (Petition, Aronstam, pp. 11, 12, 15) and that they occupy the same status as receivers or trustees in reorganization proceedings (Petition, Eppler, pp. 10, 11, 12). These contentions are the same arguments advanced by representatives of security holders in the *Baltimore and Ohio* case, the *Lehigh Valley* case and the instant case, in each of which the Court found that under the terms of the Act it had no jurisdiction to grant such allowances, and in each of which petitions for certiorari were denied by this Court. *In re Baltimore and Ohio Railroad Company,* 34 F. Supp. 154, cert.

den. 311 U. S. 717; *Schweidel* v. *Lehigh Valley Railroad Co. et al.,* unreported order Oct. 21, 1940, cert. den. 312 U. S. 684; *In re Peoria and Eastern Railway Company,* 37 F. Supp. 917, cert. den. 314 U. S. 635.

In all of those cases the courts clearly recognized the distinction, as to allowances, between Chapter 15 of the Bankruptcy Act dealing exclusively and comprehensively with *adjustments* and other chapters dealing with *reorganizations,* and denied applications of intervenors for allowances. In the instant case, at the conclusion of the adjustment proceeding, petitioner Aronstam made application for allowances. In denying the petition the Court said (*In re Peoria and Eastern Railway Company, supra,* p. 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments,* in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the Reorganization of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment,* makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

Certiorari was denied, 314 U. S. 635.

The services for which petitioners now seek compensation were rendered on behalf of the Income

Bondholders. The order of appointment prepared and submitted by petitioner Aronstam and signed by the Court provides that Mr. Aronstam "is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith" (R. 14). The provision in the proposed order providing that the compensation of petitioners as counsel, accountants and traffic experts "shall be borne and paid by the Peoria and Eastern Railway Company" was stricken from the order by the Court before signing.

In addition, the Special Court approved the appointment of independent counsel to represent the Peoria and Eastern in the proceeding, and in doing so overruled the objection by petitioner Aronstam that his "representation of the Income Bondholders is in effect tantamount to representing the Peoria and Eastern" (R. 20).

Under such circumstances, if the Special Court had any jurisdiction to make allowances to petitioners, such jurisdiction could be based only upon the general equity powers of the court, and the compensation of petitioners as representatives of a class of security holders, would depend on the benefit accruing to the corporation from their efforts. This familiar rule was recently stated by the New York Court of Appeals in *Sterling Industries, Inc.* v. *Ball Bearing Pen Corp., et al.,* 298 N. Y. 483, 493:

> "If the Middleman-Shindel group has a cause of action, its rights will be fully protected in

> equity and its counsel compensated from any recovery and only from a recovery on behalf of the corporation, subject to the approval of the court. If there be no cause of action, the plaintiff corporation will not have that discovered in equity at its expense."

The petitions herein emphasize petitioners' labors in preparing and advancing claims against the Operating Companies in amounts in excess of ten million dollars (Petition, Aronstam, pp. 5, 6, 13, 14; Petition, Eppler, pp. 5, 9, 13, 14); but these claims, with the exception of claims in the principal amount of approximately $130,000 all of which were either instituted by or supported by Mr. Adams as counsel for the Peoria and Eastern, were disallowed (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312, cert. den. 336 U. S. 919). Not only did the Peoria and Eastern not benefit from the efforts of petitioners but the activities of the Income Bondholders, whom petitioners represented, resulted in actual net loss to the Peoria and Eastern (R. 57-59).

The Special Court, in denying petitioners' applications, said (R. 71):

> "For even if we had power to make the allowance requested we feel that we could not properly charge against the estate of a debtor adequately represented an expense incurred solely at the instance of the bondholders. Petitioning counsel himself disclaims any retainer, direct or indirect, by or in behalf of the debtor. Rather, he relies upon the court's order of May 21, 1943. But the plain language of that order approved only his requested designation to represent the income

bondholders and his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court.

It follows, therefore, that as a charge against the Peoria this petition must be wholly disallowed, —disallowed not only as to the compensation of counsel and his disbursements listed in his petition as incurred and paid but also as to the appended bills of the expert witnesses retained by the petitioner without request or authorization either by the debtor or by the court."

* * * *

"It appears, however, that these experts [Eppler] rendered further service in assisting counsel for the bondholders to prepare for the hearings and in testifying at his call. Such services, like those of the other expert witnesses retained and called by counsel for the bondholders, we cannot classify as expenses of the debtor's estate."

There is an additional reason why the Eppler petition should be denied. After the entry of the order petitioner Eppler requested and received payment of the amount allowed by the court. "The general rule is well settled that unless there is a separable controversy, or unless there is some sum to which the appealing party is entitled in any event, he may not accept the benefit of the decree and later appeal." *Spencer* v. *Babylon R. Co.*, 250 Fed. 24, 26 (C. C. A. 2nd); In re *Denney*, 135 F. (2d) 184 (C. C. A. 7th); *Colquette* v. *Crossett Lumber Co.*, 149 F. (2d) 116 (C. C. A. 8th).

Conclusion.

We respectfully submit that the order of the Special Court properly denied petitioners' applications for allowances and that no reasons have been shown which warrant review by this Court.

Respectfully submitted,

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